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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 350

THOMAS FONTANA,

Petitioner,

v.

HUDSON STEVEDORING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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No. 360

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HURON STEVEDORING CORPORATION,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the District Court (R. 17-22) is reported in 106 F. Supp. 461. The Court of Appeals affirmed the decree on the opinion below (R. 30) 205 F. 2d 151.

QUESTIONS PRESENTED.

1. Whether an employee covered by the Longshoremen's and Harbor Workers' Compensation Act is entitled to a double recovery consisting of compensation and medical expenses from his employer and damages from a third party solely responsible for his injuries.

2. Whether an employee covered by the Longshoremen's and Harbor Workers' Compensation Act can withhold from the sum he owes his employer as reimbursement

for medical expenses and compensation, the expenses, including the attorney's fee, which the employee incurred in his action against the third party solely responsible for his injuries.

Statute and Rule Involved.

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act and Admiralty Rule 42 are adequately set forth in the petitioner's brief, except for Section 33 (a) of the Act, 44 Stat. 1440, 33 U. S. C. §933 (a), which reads as follows:

> "§33. Compensation for injuries where third persons are liable.
>
> (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person."

Statement.

Thomas Fontana, a longshoreman employed by Huron Stevedoring Corporation, was injured on August 31, 1945, while transferring cargo from the Lighter *T. Willetts* to the *SS. Wolverine* (R. 9, 14). Both vessels were then moored in the vicinity of Pier 57, North River, New York (R. 9, 14).

Huron promptly paid compensation directly to Fontana, without an award, as directed by Section 14 (a) of the Act, 33 U. S. C. §914 (a). Compensation was paid for 28 and 4/7ths weeks at the rate of $25 per week, a total of $714.29 (R. 12, 14).

An additional 34.6 weeks compensation was paid by Huron on the basis of the finding of the medical adviser of the United States Employees' Compensation Commission that Fontana had sustained a permanent, partial disability, equivalent to a 20% loss of function of the right foot (R. 12, 14). This additional compensation amounted to $865 (R. 12, 14). Thus the total amount paid by Huron as compensation was $1,579.29 (R. 12, 14).

Huron also paid for Fontana's medical treatment, a duty imposed on it by Section 7 of the Act, 33 U. S. C. §907. The amount paid for medical services and supplies was $153.25 (R. 12, 14).

The total sum expended by Huron on behalf of Fontana was $1,732.54 (R. 13, 14).

Having obtained all of the benefits to which he was entitled under the Act, on June 8, 1948 Fontana filed with the Deputy Commissioner a notice of election to sue a third party (R. 12, 14).

On August 25, 1948, Fontana instituted an action in admiralty against Grace Line Inc. and States Marine Corporation to recover damages in the sum of $50,000 for the injuries he sustained aboard the *T. Willetts* (R. 9, 14). In the libel, which was filed in the United States District Court for the Southern District of New York, he alleged that his injuries resulted from the unseaworthy stowage of cargo and the negligence of the respondents in failing to provide him with a safe place in which to work (R. 9, 14).

He also alleged that he had been permanently injured, that he had lost wages which he otherwise would have earned and that he had expended or was obligated to expend large sums of money to be cured of his injuries (R. 9). But prior to the filing of this libel, Huron had paid his medical expenses, two-thirds of his wages during the period of his disability, and an additional sum as compensation for his permanent, partial disability (R. 12, 14).

Neither Grace Line Inc. nor States Marine Corporation was a proper party, since they did not own, operate, manage or control either the Lighter *T. Willetts* or the *SS. Wolverine* (R. 9, 10, 14).

Fortunately for Fontana, States Marine Corporation impleaded Huron (the respondent on this certiorari); and as a result of the investigation conducted by the proctors for Huron, Pennsylvania Railroad Company was identified as a proper party and was impleaded by Huron (R. 10, 14). It was from Pennsylvania Railroad Company that the settlement funds were eventually obtained (R. 10, 14).

Subsequently, other parties were impleaded (R. 10, 14). In each instance, indemnity and/or contribution was sought from the respondents impleaded (R. 10, 14).

Before the action was reached for trial, Fontana, realizing his mistake, discontinued as against the improper parties, Grace Line Inc. and States Marine Corporation; but he refused to discontinue as against Huron (R. 10, 14). Since a respondent impleaded in an admiralty action must answer not only to the party impleading it but also to the libellant, Huron and Fontana were adverse parties.

Prior to the commencement of the trial, the Court dismissed the action against Huron whose sole and exclusive liability to Fontana was prescribed by the Longshoremen's and Harbor Workers' Compensation Act (R. 10, 11, 14). At the same time, the action was discontinued with respect to the remaining respondents except Pennsylvania Railroad Company (R. 11, 14).

A settlement was then arrived at, pursuant to which Pennsylvania agreed to pay the sum of $4,000, in full settlement of the claim (R. 11, 14).

Although Huron had duly served a notice of lien on all of the other parties to the litigation, Fontana disputed Huron's right to reimbursement for the moneys it had

expended as compensation and medical expenses (R. 3, 4, 5). Therefore Huron intervened to obtain reimbursement out of the settlement funds which had been deposited in the Registry of the Court by Pennsylvania Railroad Company (R. 7, 9).

The Court granted Huron's petition and ordered that the sum of $1732.54 be paid to Huron Stevedoring Corporation (R. 24).

Fontana appealed to the Court of Appeals for the Second Circuit, and that Court affirmed the decree on the opinion below, 106 F. Supp. 461 (R. 30), 205 F. 2d 151.

Argument.

Workmen's compensation acts usually impose on the employer, liability for the payment of compensation without regard to fault on the part of either the injured employee or the employer. But sometimes a person other than the employer is solely responsible for the compensable injury. In such cases, a double recovery of compensation from the employer and damages from the third party is denied the employee by most compensation acts.

Section 33 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §933, directs the employee to elect either to receive compensation or to recover damages against the third person.

The plan of the Act is to avoid a double recovery, and it is disclosed in clear and unambiguous language in Section 33. Therefore every court that has ever considered the quesion has held that there can be no double recovery under this Act. In addition, the legislative history reveals that Congress wished to avoid such a result. Yet petitioner argues that the Act permits a double recovery. It is this contention, wholly unsupported by any authority, that he

calls an important question of federal law. But it is so obvious that there is no contest between petitioner's reading of the statute and that of the lower courts, that this case cannot fairly be said to present a question of statutory construction.

Similarly, petitioner's argument that he should be permitted to withhold from the sum he owes his employer as reimbursement for medical expenses and compensation, the expenses of petitioner's third party action, including the fee of his attorney, does not involve a question of statutory construction. The statute specifically provides that if the employer prosecutes the action, he shall retain from any recovery the expenses of the suit and the cost of all benefits he has paid and which will become payable under the Act; any excess is paid to the person entitled to compensation. Thus the purpose of Congress was to provide full reimbursement to the employer. If a different result had been intended where the employee prosecutes the action, Congress could have so provided.

Furthermore, it has been repeatedly held that in the absence of a contract, express or implied, or a statute so providing, a party is not required to pay the fees of an attorney whom he has not employed, even though he benefited as a result of the services the attorney rendered his own client.

The decision of the Court of Appeals for the Third Circuit in *The Etna,* 138 F. 2d 37 (1943), is not in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Crab Orchard Imp. Co.* v. *Chesapeake & Ohio Ry. Co.,* 115 F. 2d 277 (1940), cert. den. 312 U. S. 702.

In *The Etna,* the Court held that an employee covered by the Longshoremen's and Harbor Workers' Compensation Act was not entitled to a double recovery—the identical question that is presented in the instant case. The Court

based its opinion on the express language of the Act and upon equitable principles.

The *Crab Orchard Imp. Co.* case involved the construction of the West Virginia Workmen's Compensation Act, an act which, unlike the Longshoremen's and Harbor Workers' Compensation Act, contained no provision dealing with compensation for injuries for which third persons are solely liable. In affirming the lower court's dismissal of the employer's suit against the third party responsible for the employee's injury, the Court of Appeals properly held that the West Virginia legislature had not intended that the employer be reimbursed.

The courts below have not decided the issues in conflict with the applicable decisions of this Court. Mr. Justice Minton, speaking for the majority of this Court in *Pillsbury* v. *United Engineering Co.*, 342 U. S. 197, 200 (1952), stated that although the Longshoremen's and Harbor Workers' Compensation Act should be liberally construed, this Court does not have the power to rewrite a section of the statute. Petitioner's construction would have the effect of striking from the Act Section 33(a), which directs the employee to elect either to receive compensation or to recover damages from the third party solely responsible for his injuries.

The lower courts held that petitioner could not withhold from the sum he owed his employer as reimbursement for medical expenses and compensation, the expenses, including the attorney's fee, which he incurred in his action against the third party solely responsible for his injuries. Their decisions were not in conflict with *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939). The *Sprague* case was an equitable action of the type commonly classified as a class or representative action. In such cases, the courts have the power to make an award "as between solicitor and

client." "* * * Such allowances are appropriate only in exceptional cases and for dominating reasons of justice." *Id.* at page 167. But the instant case was a mere suit for damages, in the result of which Fontana and Huron were in no sense jointly interested—in fact, they were adverse parties. (Page 4 of this brief.) In such cases, counsel fees and legal expenses are not allowed.

The decision of the District Court was obviously correct. The statutory requirement that the employee elect either to receive compensation or to recover damages is so clearly expressed and the legislative materials are so unequivocal that only petitioner's blind partisanship could urge a construction of the Act that would permit a double recovery.

I.

The decision below is correct.

A. Petitioner's argument that a double recovery is permitted under the Act is based on a perverted reading of a single subdivision of Section 33. He ignores the other parts of the Section and the legislative history.

It is a familiar canon of construction that the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the purpose of the enactment. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 439 (1935) (dissenting opinion). But petitioner's argument that the Act permits a double recovery is based on his interpretation of just one section, Section 33(b). He ignores Section 33(a), as well as the legislative history because they completely refute his contentions.

The language of Section 33(a), 33 U. S. C. §933(a), which follows, reveals that the plan of the Act is to avoid a double recovery.

> "§33. Compensation for injuries where third persons are liable.
>
> "(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person."

The requirement that the employee choose between compensation and damages compels the implication that he must give up one or the other—he cannot have both.

Turning to Section 33(b), 33 U. S. C. §933(b), we find the following language:

> "(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

The purpose of this section is to give the employer control over the employee's claim against the responsible third person in the event that the employee elects to receive compensation.

Prior to 1938, Section 33(b) read as follows:

> "(b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person whether or not the person entitled to compensation has notified the deputy commissioner of his election."

As the Act then read, the employer was given control over the employee's claim as soon as any compensation was paid.

The purpose of the 1938 Amendment was to postpone the employee's election until he could make a considered choice between compensation and damages. *American Stevedores* v. *Porello,* 330 U. S. 446, 456 (1947). The amendment didn't abolish the requisite election.

But any doubt concerning the aim of the 1938 Amendment is dispelled by House Report No. 1945, which was incorporated into and made a part of Senate Report No. 1988. The following explanation is found at page 9 of the Report:

> "The purpose of this amendment is to remove possible cause of complaint regarding the operation of the provision in subdivision (b) of section 33 in making the mere acceptance of compensation work automatically an assignment to the employer of all rights of action against the third party tort-feasor. Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice. The assignment of this right of action against the third party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the deputy commissioner, thus giving opportunity to the injured person, or to the beneficiaries in case of death, to consider the acceptance of compensation from the employer with the resulting loss of right to bring suit in damages against the third party alleged to be liable for the injury." Sen. Rep. No. 1988, 75th Cong., 3d Sess. (1938).

Petitioner is under the impression that this amendment has had the effect of allowing a double recovery by the employee. Obviously his impression is an erroneous one.

B. Unless compensation is paid under an award, the employee controls the third party claim.

In developing his argument, petitioner contends that the employer is not entitled to reimbursement unless the compensation is paid under an award. But why should its right to reimbursement be so conditioned? At page 16 of his brief, petitioner indirectly suggests that reimbursement is a reward for which the employer becomes eligible only when he assumes the "effort, expense and risk of third party litigation." This suggestion ignores the fact that the 1938 Amendment to Section 33(b) has given almost complete control over the third party claim to the employee. Unless there has been a compensation award, the employee decides whether the third party claim is to be prosecuted at all. And the employee's right to make this decision is a privilege, not a burden.

C. If reimbursement were allowed only when compensation was paid under an award, the administration of the Act would be thrown into chaos.

If petitioner's construction of Section 33(b) were followed, the employer would not be able to obtain reimbursement unless the compensation were paid under an award. However, the Act directs the employer to pay compensation promptly, *without an award,* unless he controverts liability. Therefore, employers would be forced to controvert liability and refuse to pay medical expenses and compensation until an award had been made by the deputy commissioner or forego reimbursement. This would completely frustrate the principal purpose of the Act, which is expressed at page 19 of House Report No. 1767, 69th Congress, 2d Session (1927), in the following language:

> "It is the modern substitute for the old common-law remedy afforded through actions at law for damages, and promptly affords relief to the injured employee by furnishing medical attendance and supplies immediately upon the occurrence of the injury or as soon thereafter as possible and compensation during the period of his illness or inability to pursue his usual employment * * * without the delay and expense which an action at law entails."

We cannot assume that Congress intended to encourage employers to refrain from paying compensation and medical expenses until the rendering of "an award in a compensation order filed by the deputy commissioner" because such a course would throw the administration of the Act into chaos and cause incalculable harm to the employees.

D. The purpose of Section 7(d) was to assure the employer that he would be reimbursed for medical expenses.

At page 15 of his brief, petitioner states that Section 7(d) entitles the employer to reimbursement for medical expenses, only when he "assumes" the risk and expense of third party litigation. This suggestion demonstrates unfamiliarity with the Act's history. Section 7(d) was enacted in 1938, at the same time that Section 33(b) was amended. Prior to the enactment of Section 7(d), the Act did not expressly grant the employer the right to reimbursement for medical expenses. The purpose of Section 7(d) was to assure the employer that he would be reimbursed, thus encouraging him to furnish prompt treatment to the employee. Sen. Rep. No. 1988, 75th Cong., 3d Sess. 4, 5 (1938).

E. The reported decisions unanimously hold that the Act does not allow a double recovery.

In *Aetna Life Ins. Co.* v. *Moses,* 287 U. S. 530 (1933), Mr. Justice Stone discussed the plan of the Act in the following language, at page 542:

> "The suggestion of the trial court that subrogation is precluded here by the non-assignability, under the death act and the common law, of the administratrix's cause of action for death, is without force. Considerations of policy which may forbid the voluntary assignment of the cause of action are obviously inapplicable to a case where the statute does assign the action to the employer in order to carry out the plan of the Compensation Act. That plan would be destroyed if the insurance company were denied the right of subrogation. For the consequence would be to permit that double recovery by either the employer or the next of kin entitled to compensation which the statute is careful to avoid, with a resulting increase in the cost of the insurance which the statute requires."

The precise question involved in this appeal was presented to the Court of Appeals for the Third Circuit in *The Etna,* 138 F. 2d 37 (1943). Mitchell, the employee, brought an action against the owner of the vessel on which he was injured. He was awarded a decree, but refused to reimburse his employer. The latter then intervened for the purpose of having its right to subrogation and the amount thereof determined and impressed upon the money due Mitchell under his decree against the third party.

The District Court ordered Mitchell to reimburse his employer. On appeal, Mitchell contended that the employer was not entitled to reimbursement because the compensation was not paid under an award in a compensation order

filed by the deputy commissioner. In affirming the decree of the District Judge, the Court stated its conclusion as follows:

> "We find no intent indicated by the Act to take away from the employer who pays compensation without an award his right to reimbursement out of his employee's recovery from third persons. On the contrary, we think that the intent and scheme of the Act requires that the employer's right to subrogation for compensation payments made in the circumstances here shown be recognized wholly apart from and without regard for the assignment provided for in Section 33(b) of the Act. It is only the right of control of the employee's right of action against third persons which an employer foregoes by paying compensation without an award. His right to reimbursement out of the recovery for the employee's injury remains unaffected." Page 41.

Petitioner's contention that the 1938 amendment to Section 33(b) has expressly limited the Section was disposed of in *The Etna* opinion, as follows:

> "Any construction of the Act which would deny an employer a right to reimbursement for compensation payments made in the circumstances here present because the compensation was not paid 'under an award in a compensation order filed by the deputy commissioner' would necessarily impute an exclusory effect to Sec. 33(b) which that provision neither expresses nor implies and would, moreover, defeat one of the principal expressed purposes of the Act." Page 40.

The identical question involved in this appeal and the same Longshoremen's and Harbor Workers' Compensation Act engaged the attention of the New York State Court

of Appeals in *Ruggiero* v. *Liberty Mutual Ins. Co., et al,* 298 N. Y. 775 (1948), and the Court followed *The Etna* decision.

In the following cases, *The Etna* was cited with approval: *Baccile* v. *Halcyon Lines,* 187 F. 2d 403, 406 (3 Cir. 1951), rev'd on other grounds, 342 U. S. 282 (1952); *Palazzolo* v. *Pan-Atlantic S. S. Corp.,* 1952 A. M. C. 522 (E. D. N. Y.); *Lundberg* v. *Prudential Steamship Corp.,* 102 F. Supp. 115, 120 (S. D. N. Y. 1951); *Bruschi* v. *Fed. Comm. & Nav. Co., et al.,* 1949 A. M. C. 977 (S. D. N. Y.); *Petition of M. P. Howlett, Inc.,* 75 F. Supp. 438, 439 (E. D. N. Y. 1948); *Moragnel* v. *Moore-McCormack Lines Inc.,* 75 F. Supp. 969, 974 (D. Md. 1948); *Grasso* v. *Lorentzen,* 56 F. Supp. 51, 54 (S. D. N. Y. 1944); *American Employers Ins. Co.* v. *Benjamin Foster Co.,* 86 F. Supp. 711 (E. D. Pa. 1949); *Coal Operators Casualty Co.* v. *U. S. A.,* 76 F. Supp. 682 (E. D. Pa. 1947); *Lumbermens Mut. Cas. Co.* v. *Beschner,* 198 Misc. 375 (Sup. Ct. N. Y. County 1950).

There are no cases to the contrary.

F. Petitioner cites no cases under this Act to support his contentions. All cases cited by him arose under state compensation acts that permit a double recovery.

It has been impossible for petitioner to cite a single case decided under the Longshoremen's and Harbor Workers' Compensation Act which supports his contentions. And he has completely ignored the legislative history. Instead, he relies on other compensation acts. *Maryland Casualty Co.* v. *Stephens,* 47 S. E. 2d 108 (1948), involved the Georgia Workmen's Compensation Act which was amended in 1937 to permit a double recovery of both damages and compensation. *Trumbull Cliffs Furnace Co.* v. *Schackovsky,* 111 Ohio 791, 146 N. E. 306 (1924) and *Truscon Steel Co.* v. *Trumbull Cliffs Furnace Co.,* 120 Ohio St. 394, 166 N. E.

368 (1929) were decided under the Ohio State Workmen's Compensation Law which specifically prevented reimbursement by the employer. And *Crab Orchard Imp. Co.* v. *Chesapeake & Ohio Ry. Co.*, 115 F. 2d 277 (4 Cir. 1940), cert. den. 312 U. S. 702, was decided under the West Virginia Workmen's Compensation Act which contained no provision for subrogation or assignment. In that case, the court properly held that the legislature had not intended that the employer be reimbursed. But it was stated in the opinion that the inclusion of a subrogation provision in workmen's compensation acts prevents the employee from acquiring two separate remedies for a single injury. *Id.* page 279.

G. It is not the law that a party to a suit to recover damages for personal injuries must pay the fee of opposing counsel and other expenses of litigation.

In the absence of a contract, express or implied, or a statute so providing, a party is not required to pay the fees of an attorney whom he has not employed, even though he benefited as a result of the services the attorney rendered his own client. *Simmons* v. *Friday*, 190 F. 2d 849, 851 (8 Cir. 1951); *Matter of Loomis*, 273 N. Y. 76, 82 (1937); *Matter of Attorney-General* v. *North Am. L. Ins. Co.*, 91 N. Y. 57 (1883); *In re Hurewitz' Will*, 174 Misc. 182, 20 N. Y. S. 2d 432, 433 (Surr. Ct. Kings County 1940); *Gibson* v. *Gibson*, 122 Ind. App. 559, 569, 106 N. E. 2d 102, 107 (1952); *Felton* v. *Finley*, 69 Idaho 381, 388, 209 P. 2d 899, 903 (1949); *Gilpin* v. *Burrage*, 188 Tenn. 80, 89, 216 S. W. 2d 732, 736 (1949); *Lewis* v. *Wilkinson*, 237 Ala. 197, 198, 186 So. 150 (1939); *Garvin* v. *Rappaport*, 216 Ind. 471, 475, 25 N. E. 2d 249 (1940); *Thomas* v. *Lewman*, 190 Okla. 37, 41, 120 P. 2d 341, 346 (1941); *Draper* v. *Draper*, 24 Tenn.

App. 548, 553, 147 S. W. 2d 759, 762 (1940); *Howard* v. *Carmichael,* 237 Ky. 462, 473, 35 S. W. 2d 852, 857 (1931); *Spinner* v. *Fidelity & Casualty Co. of New York,* 245 Ky. 519, 522, 53 S. W. 2d 946, 948 (1932).

In *Matter of Loomis,* 273 N. Y. 76 (1937), the following statement of the general rule is found at page 82:

> "The fact that others were benefited does not, in the absence of agreement by them, impose a liability upon them to pay."

In the instant case, Huron was impleaded by States Marine Corporation. In admiralty, a respondent impleaded must answer to the libellant, as well as to the party impleading it. Admiralty Rule 56. Thus, Huron's position with respect to Fontana was that of an adverse party, even though the Act relieved it of direct liability to Fontana, except for its obligations under said Act. In *Simmons* v. *Friday,* 190 F. 2d 849 (8 Cir. 1951), it was said:

> "It is not the law in the ordinary case to require a litigant to pay the fee of opposing counsel." Page 851.

In those actions which are termed class or representative actions, the expenses of litigation, including attorneys' fees, may be spread among all members of the benefited class. The cases which petitioner cites in support of his contention that he can withhold a proportionate share of his attorney's fee and the expenses of his suit did not arise under the Longshoremen's and Harbor Workers' Compensation Act or any other compensation act—they are all class or representative actions. *Harrison* v. *Perea,* 168 U. S. 311 (1897), involved litigation arising out of a decedent's estate. *Sprague* v. *Ticonic National Bank,* 307 U. S. 161 (1939), involved a bill against two banks to impress

upon the proceeds of bonds a lien for petitioner's trust deposit for which the bonds were security. *O'Hara* v. *Oakland County,* 136 F. 2d 152 (6 Cir. 1943) arose out of an equitable action to have proceedings leading to the establishment of a drainage district declared illegal and void.

Significantly, Section 105(2) of the Restatement of Restitution (1937) on which petitioner relies, applies to representative actions, as its accompanying comment clearly demonstrates.

H. Under state workmen's compensation acts, it has been consistently held that the employee cannot recover from the employer the expenses of the third party suit.

In cases arising under state workmen's compensation acts, the courts have consistently held that the employee could not withhold a proportionate share of the attorney's fee from the sum due the carrier as reimbursement for sums paid under the applicable state act. *Ocean S. S. Co.* v. *Lumbermen's Mut. Casualty Co.,* 125 F. 2d 925 (2 Cir. 1942); *Firemen's Fund Indemnity Co.* v. *Batts,* 11 N. J. Super. 242 (1951); *Dodds* v. *Stellar,* 30 Calif. 2d 496, 183 P. 2d 658 (1947); *Spinner* v. *Fidelity & Casualty Co. of New York,* 245 Ky. 519, 522, 523, 53 S. W. 2d 946 (1932).

In some jurisdictions the compensation acts have been amended to require the employer to pay part of the fee of the employee's attorney. See New Jersey Workmen's Compensation Law, R. S. 34:15-40, (b&e); Pennsylvania Workmen's Compensation Act, 1937, June 4, P. L. 1552, §1; 1939, June 21, P. L. 520, §1; 1945, May 18, P. L. 671, §1; 1951, May 29, P. L. 507, §1; California Workmen's Compensation Act, Stats. 1949, ch. 120, §2. Before the New Jersey, Pennsylvania and California acts had been amended, it had been held in New Jersey and California

that there was no such obligation. A similar ruling was implied in Pennsylvania. See *Firemen's Fund Indemnity Co.* v. *Batts*, 11 N. J. Super. 242, 245 (1951); *Dodds* v. *Stellar*, 30 Calif. 2d 496, 183 P. 2d 658 (1947); *Wilson* v. *Pittsburgh B. & I. Works*, 85 Pa. Super. 537 (1925); *Ellis* v. *Atlantic Refining Co.*, 309 Pa. 287 (1932).

If Congress had intended that the employer bear part of the expenses of the third party action under the Longshoremen's and Harbor Workers' Compensation Act, it could have easily so provided, either by original enactment or by amendment. It has never done so. In such circumstances the courts do not interfere. *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282 (1952).

II.

There is no conflict of decision.

The question whether an employee covered by the Longshoremen's and Harbor Workers' Compensation Act is entitled to a double recovery consisting of compensation benefits from the employer and damages from a third person solely responsible for his injuries has been decided by the Court of Appeals for the Third Circuit in *The Etna*, 138 F. 2d 37 (1943) and by the Court of Appeals for the Second Circuit in the instant case.

Petitioner argues that the reasoning revealed by Judge Jones in *The Etna* opinion conflicts with that of the Court of Appeals for the Fourth Circuit in *Crab Orchard Imp. Co.* v. *Chesapeake & Ohio Ry. Co.*, 115 F. 2d 277 (1940), cert. den. 312 U. S. 702, a case which involved the West Virginia Workmen's Compensation Act, not the Longshoremen's and Harbor Workers' Compensation Act.

The *Crab Orchard Imp. Co.* opinion placed considerable reliance on *Mercer* v. *Ott*, 78 W. Va. 629 (1916). In the latter case, the Supreme Court of Appeals of West Virginia held that the West Virginia Workmen's Compensation Act did not prohibit a double recovery. This decision was singled out for comparison by Mr. Justice Stone in *Aetna Life Ins. Co.* v. *Moses*, 287 U. S. 530, 538 (1933), in which he stated that a double recovery is avoided under the Longshoremen's and Harbor Workers' Compensation Act. Finding that the West Virginia Act did not prohibit a double recovery, the Court in the *Crab Orchard Imp. Co.* case properly affirmed the dismissal of the employer's suit against the third party responsible for the employee's injury; but it pointed out at page 279:

> "The express inclusion of a subrogation provision in Workmen's Compensation Acts prevents the employee from acquiring for a single injury two separate remedies * * *."

The Longshoremen's and Harbor Workers' Act prohibits a double recovery: the West Virginia Act does not prohibit or prevent such a recovery.

Clearly there is no conflict upon a question of federal law requiring review by this Court.

III.

There is no important question of Federal Law.

The Longshoremen's and Harbor Workers' Compensation Act specifically requires that an employee injured through the fault of a third person elect either to receive compensation or to recover damages. Section 33(a), 33 U. S. C. 933(a). It does not allow a double recovery. *Aetna Life Ins. Co.* v. *Moses*, 287 U. S. 530, 538, 542 (1933). If

the employee obtains a recovery from the third person, he must reimburse the employer for compensation and medical expenses. *The Etna,* 138 F. 2d 37 (3 Cir. 1943).

Petitioner's construction of the Act ignores the plain language of the Statute, its legislative history and all the reported cases. Such a perverse reading of the Act does not present an important question of statutory construction.

In contending that he should be allowed to withhold from the sums due his employer as reimbursement the expenses of his third party action, petitioner has not even mentioned the Longshoremen's Act. The reason is that the plan of the Act calls for full reimbursement to the employer. Section 33(e)(1)(A), 33 U. S. C. §933(e)(1)(A). Therefore petitioner seeks to invoke equitable principles in an ordinary personal injury suit. This certainly presents no important or novel question.

Under state acts, such expenses have consistently been denied the employee. *Spinner* v. *Fidelity & Casualty Co. of New York,* 245 Ky. 519, 522, 523, 53 S. W. 2d 946, 948 (1932); *Ocean S. S.* v. *Lumbermen's Mut. Casualty Co.,* 125 F. 2d 925 (2 Cir. 1942); *Firemen's Fund Indemnity Co.* v. *Batts,* 11 N. J. Super. 242, 245 (1951); *Dodds* v. *Stellar,* 30 Calif. 2d 496, 183 P. 2d 658 (1947); *Ellis* v. *Atlantic Refining Co.,* 309 Pa. 287 (1932).

IV.

THE DECISION OF THE COURTS BELOW IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Petitioner argues that the courts below did not liberally construe the Longshoremen's and Harbor Workers' Compensation Act and that they amended it by judicial construction. He cites *Pillsbury* v. *United Engineering Co.,*

342 U. S. 197 (1952), in support of these contentions. That case held that a claim for compensation under this Act must be filed within one year after the injury, not within one year after the injury becomes disabling.

Presumably petitioner relies on the following statement in Mr. Justice Minton's opinion:

> "We are aware that this is a humanitarian Act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all." Page 200.

Certainly this statement should give no comfort to petitioner because he is asking this Court to rewrite the statute and make possible a double recovery contrary to the express purpose of the Act.

Petitioner also contends that the decisions of the courts below which prohibited the withholding by petitioner of the attorney's fee and the legal expenses of his third party action are probably in conflict with applicable decisions of this Court, citing *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939). In the *Sprague* case the petitioner, by establishing her claim to the proceeds of certain bonds which were security for her trust fund, established the claims of fourteen other trusts secured by the same bonds. Therefore this Court held that she was entitled to an allowance for counsel fees and litigation expenses. Her suit was, in effect, a class action. The instant suit was merely an action to recover damages for personal injuries in which at one stage the petitioner and respondent were adversaries. It is not one of those exceptional cases in which an award "as between solicitor and client" is appropriate, and there is no conflict between the *Sprague* decision and the decisions of the courts below in the instant case.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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